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IN THE

# Supreme Court of the United States

October Term, 1975

No. 75-856

MILTON LEVIN,

*Appellant,*

*vs.*

FRANK A. GULOTTA, individually and as Presiding Justice, Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, *et al.*,

*Appellees.*

**On Appeal from the United States District Court for the Eastern District of New York**

## JURISDICTIONAL STATEMENT

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## JURISDICTIONAL STATEMENT

Milton Levin appeals from the order and judgment of a divided three-judge United States District Court for the Eastern District of New York dismissing his complaint (2-1) on the merits of his constitutional claim.

All three judges below unanimously agreed that Levin's case presents "serious" issues. Judge Moore (C.J.), in fact, declared explicitly that the "constitutional question" posed by Levin's case "is of sufficient importance to be

resolved by our highest court." Indeed, Judge Moore's concurring opinion, while holding against Levin's claim on the merits, is virtually a direct invitation to this Court to review Levin's claim on appeal.

That claim challenges the constitutionality of New York State's statutory procedure for disciplining attorneys—an arbitrary scheme which deprives attorneys of fundamental procedural rights granted by the State to all others and guaranteed by the Fourteenth Amendment of the United States Constitution. Levin's claim does not challenge the State's conceded power to impose and maintain strict standards of professional conduct for members of the bar. Nor does Levin question the legitimacy of the standards themselves. Instead, his attack is upon the unfair and constitutionally indefensible means used by the State to enforce those standards.

The dissenting judge below, Hon. Jack B. Weinstein (D.J.), voted to uphold Levin's claim, concluding (in a comprehensive opinion of 60 printed pages):

> "Despite my high regard for New York's tradition in maintaining the high ethical standards of its bar, I reluctantly conclude that its disciplinary procedure is constitutionally infirm in denying attorneys the due process and equal protection guaranteed by the Fourteenth Amendment of the United States Constitution. There is no inconsistency between fair treatment of lawyers and maintenance of the long tradition of their discipline by the courts." (A40a).*

* The reference is to Appendix A, which contains the majority and dissenting opinions of the court below. All of the appendices to this Jurisdictional Statement are contained in a concurrently filed separate volume. References to the individual appendices in that separate volume are prefaced with the appendix letter followed by the page number.



Specifically, Judge Weinstein held the statutory procedure unconstitutional because:

> "The trier, Appellate Division, decides the facts without hearing the witnesses and without the opportunity to determine credibility by observing them testify; it denies counsel the opportunity to orally argue the merits of the case; and it fails to give reasons for its decision, even when it rejects the report of the referees who have heard the witnesses. . . . The law also is unconstitutional in denying attorneys the equal protection of an appeal permitted all other professionals." (A80a, A99a.)

Applied in Levin's case, the statutory procedure resulted in his suspension from practice after the only State officer (a State supreme court justice) who held a hearing, listened to argument, or stated the reasons for his decision, found that Levin was "innocent of the two charges preferred against him," that the charges were "supported by little more than conjecture and surmise"—and that "*an injustice*" had been done to Levin "in subjecting him to the rigors of the [State] disciplinary proceeding" (D143a-144a; emphasis added).*

A State statutory scheme that leads to such results is, as Judge Weinstein found, plainly unfair and wrong. No valid State interest justifies it. No rational foundation supports it.

But the majority below (Moore, C.J., and Neaher, D.J.) has found otherwise. It holds that attorney disciplinary

* The reference is to the report of the referee in the State disciplinary proceeding against Levin, which was annexed as an exhibit to Levin's amended complaint in this action. That amended complaint, with exhibits, is set forth in Appendix D.

proceedings are merely "inquests," in which few procedural rights attach—notwithstanding the devastating sanctions that result from such proceedings, which led this Court to characterize them as "adversary proceedings of a quasi-criminal nature." *In Re Ruffalo,* 390 U.S. 544, 551 (1968). Indeed, the majority below explicitly rejects this Court's view of the nature of disbarment proceedings (A17a-19a, A25a), finding that the State's interest in enforcing attorney discipline justifies depriving accused attorneys of the protections of the courts they serve and the Constitution they are sworn to uphold. Thus, the decision below paves the way for the erosion of procedural rights now available to attorneys in State disciplinary proceedings. Further, it sanctions—in the name of public interest —punishment without fair process and punishment without review, for only one group of citizens.

Under all of these circumstances, we submit. it is manifest that a substantial question is here presented, which this Court can and should now resolve on appeal. Towards that end, Milton Levin respectfully submits this Jurisdictional Statement.

## Opinions Below

There were three opinions below: A majority opinion by Judge Neaher, a concurring opinion by Judge Moore and a dissenting opinion by Judge Weinstein. The opinions are not yet reported. They are set forth in Appendix A.



## Jurisdiction

This suit was brought under 42 U.S.C. §1983 and the Fourteenth Amendment of the United States Constitution to enjoin the enforcement and operation of a State statute as unconstitutional. The order and judgment sought to be reviewed were entered on October 9, 1975 and October 16, 1975, respectively. The order is contained in Appendix A (at 33a). The judgment is set forth in Appendix B. Levin's Notice of Appeal was filed in the district court on November 10, 1975, and is reprinted in Appendix C.

The order and judgment of the three-judge district court, denying the injunctive relief sought by Mr. Levin and dismissing his complaint, rest upon a resolution of the merits of Levin's constitutional claim. Although Judge Neaher stated that he would also dismiss on the ground of abstention, he expressly reached and ruled on the merits of Levin's constitutional claim (A17a-27a). Moreover, Judge Moore concurred with Judge Neaher *only* on the merits (A34a-37a). And Judge Weinstein ruled in Levin's favor on all questions (A38a-106a).

Thus, the three-judge district court below did *not* abstain, but resolved the merits of Levin's constitutional claim. Accordingly, this Court has jurisdiction to review the order and judgment below pursuant to 28 U.S.C. §1253. *MTM, Inc.* v. *Baxley,* 420 U.S. 799, 804 (1975).

## Statutes and Constitutional Provisions Involved

The State statute challenged in this action is Section 90 of the New York Judiciary Law, subdivisions 2, 3, 6 and 8, the text of which is set out in Appendix G. (Hereinafter the statute is referred to as "the New York Attorney Disciplinary Statute" or "the Statute.")

This case also involves Article 6, Section 3 of the New York State Constitution, Sections 5501(b) and 5601 of the New York Civil Practice Law and Rules ("CPLR"), Section 1 of the Fourteenth Amendment of the United States Constitution, and Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, the texts of which are set out in Appendix G.

## Questions Presented

In this case, an attorney was found guilty of professional misconduct and ordered suspended from practice by a trier which observed not a single witness, heard not a stitch of argument and wrote not a word of explanation for its decision. The attorney had no State appeal from the trier's punishment—although the State would have given him one on all questions had he been anything other than a lawyer.

Under these circumstances, the overall question presented here is whether a State statutory procedure which so provides and discriminates violates the Fourteenth Amendment of the United States Constitution, and thus should be struck down.



The specific questions are these:

1. Whether a State's concededly valid interest in maintaining an ethical bar justifies arbitrary disbarment procedures, which are totally unnecessary to effectuate the State's purpose.

2. Whether procedural due process in an attorney disciplinary proceeding entitles the accused attorney to a hearing before the body with the initial power to decide and punish, and to a written statement from the trier setting forth the reasons for its decision or the evidence it relied on.

3. Whether it is a violation of equal protection for a State which considers appellate review a bedrock procedural right to deny such review to but one group of persons within its jurisdiction (*i.e.*, attorneys in disciplinary proceedings)—particularly when such denial bears no rational relationship to any conceivable legitimate State purpose.

4. Whether the Due Process Clause of the Fourteenth Amendment requires that attorneys be given at least one appellate review of adverse disciplinary orders when they are not given a full and fair hearing in the court of first instance.

## Statement of the Case

Milton Levin is a 68 year old attorney, who had been a member of the New York bar with an unblemished record for over 40 years prior to the State disciplinary proceeding against him.

The appellees are the justices and clerk of the Appellate Division of the New York Supreme Court, Second Judicial Department (hereinafter collectively, "Second Department" or "Appellate Division"). Each Appellate Division of the State supreme court is vested by law with exclusive jurisdiction over attorney discipline within its judicial department (A12a).

Levin commenced this federal action after the Second Department directed his suspension from practice for three years, and after he was denied an appeal of the suspension order by the State Court of Appeals (A9a, A44a). Since Levin's complaint attacked a State statute as constitutionally invalid on its face or as applied, and sought injunctive as well as declaratory relief, a three-judge district court was convened to hear the suit.* At the same time, Judge Weinstein entered an order staying Levin's suspension from practice *pendente lite* (E149a). The three-judge court rendered its decision on October 9, 1975. Although the court denied injunctive relief and dismissed the complaint (2-1), the three judges "unanimously" agreed to continue the stay against Levin's suspension pending disposition of his case on appeal "since serious procedural and substantive issues are presented" (A33a).

**The New York Attorney Disciplinary Statute and the Levin Disciplinary Proceeding**

We believe that the constitutional vice of the New York Attorney Disciplinary Statute is plain from a description

* Two cases raising claims similar to Levin's were consolidated solely for hearing before the same three-judge district court. *Mildner* v. *Gulotta, et al.*, 74 C 1001, and *Gerzof* v. *Gulotta, et al.*, 74 C 1684. We do not know whether the plaintiffs in those cases have filed appeals from the decision below.



of its provisions, and could not possibly be better illustrated than in the case of Milton Levin. Hence, we shall now briefly review the statutory provisions and their precise operation in the Levin disciplinary proceeding:

1. ***The Appellate Division institutes the charges against the attorney.***

The charges in the proceeding against Levin did not relate to any aspect of his legal practice or professional activity. They arose instead from his participation as a witness in a 1970 State inquiry (the "Inquiry") into the activities of a former State Supreme Court Justice named Michael M. D'Auria. Specifically, Levin was charged with giving false testimony and submitting four false documents to the Inquiry, all allegedly to disguise the payment of a legal fee to D'Auria three years earlier for professional services in connection with a zoning application (A7a-8a, A43a).

It is noteworthy that, at the time the alleged "secret" legal fee was paid, D'Auria was not a judge, but simply a practicing attorney in Levin's community. Levin was in the real estate business and employed D'Auria's law firm, as well as others, on various zoning matters. Given these circumstances, the disciplinary charges against Levin were most peculiar. Indeed, no evidence was ever offered as to why Levin, a client, could conceivably have been motivated to disguise the payment of a legal fee to his lawyer.

2. ***The Appellate Division appoints one agent to prosecute the charges (a "petitioner") and another to hear and report on them (a "referee"). The referee has no power***

*to decide the charges, nor are his findings in any way binding on the Appellate Division (A61a). This is so whether the appointed referee is an attorney or (as in Levin's case) a justice of the State supreme court (A82a-83a).*

The Second Department appointed a petitioner and a referee in the Levin proceeding (A8a, A43a). The referee conducted ten days of hearing, during which he heard and observed 11 witnesses and listened to arguments of counsel. He then concluded that the charges against Levin were "supported by little more than conjecture and surmise;" and he condemned the disciplinary proceeding as an "injustice" to Levin (A43a, D143a).

3. *The referee files his report with the Appellate Division, which sits in an attorney disciplinary proceeding, not as an appellate tribunal, but as the court of first instance (A16a-17a, A21a).*

The referee in the Levin proceeding set forth his views in a comprehensive report to the Appellate Division, making detailed findings of fact on every issue, including the key factual issue in the case: Credibility. (A44a.) He resolved the credibility questions wholly in Levin's favor, noting that over the "lengthy hearing," he "had an extensive opportunity to closely observe" the parties and witnesses. The referee wrote:

> "I was impressed with his [Levin's] background and his demeanor. His testimony before me was candid and credible. A thorough analysis of the evidence leads me to the conclusion that the charges against [Levin] are supported by little more than conjecture and surmise" (D143a).



In contrast, the referee noted inconsistencies in the testimony of the two Inquiry investigators who appeared at the hearing (A44a). And during the hearing, he *censured* the petitioner's chief witness (a lawyer named Bertram Corin) for suppressing a document and attempting to justify his action (*id.*).

4. *After the referee files his report, the Appellate Division, as trier, may disaffirm it in whole or in part. It may make new findings of fact. Even on credibility questions, the Appellate Division may substitute its judgment for that of the referee. And, the Statute empowers the Appellate Division to so rule, and to direct punishment, solely on the basis of a cold, printed record, with no hearing of its own. (A16a-17a, A41a.)*

Six months after the referee filed his report, the petitioner moved the Second Department to disaffirm. Levin cross-moved to confirm.

The Appellate Division's first act thereafter was to ignore Levin's request for oral argument. Its next was to enter a summary decision, disaffirming the referee's report as to one portion of the false document charge against Levin. The Appellate Division neither took any additional evidence nor observed any of the parties or witnesses before reaching this decision (A43a).

5. *The Statute empowers the Appellate Division to announce its ruling in a summary statement, without any explanation whatsoever for its decision—whether or not the decision repudiates the referee's report (A17a, A41a).*

*The Appellate Division may then impose punishment ranging from censure to total disbarment (A41a).*

The Second Department ruled against Levin and overturned its referee justice in a single conclusory sentence, without further comment:

> "In our opinion, contrary to the report, the first charge, insofar as it relates to a document dated March 6, 1967 involving the transfer of a Chris-Craft boat, was sustained by the evidence" (D146a).

The Appellate Division's solitary sentence stood against a ten day hearing, a 1072 page hearing record, 91 exhibits and a 25 page report by the referee. Yet on the basis of that one sentence, the Appellate Division ordered the then 67 year old Levin suspended from the practice of law for three years. It gave absolutely no explanation for its crushing sanction, which, in light of Levin's advanced age, was tantamount to disbarment. Nor did it explain its partial disagreement with the referee or point to any evidence in the record supporting its contrary conclusion.

6. *From the Appellate Division's adverse decision and sentence, the New York attorney (unlike all other New York professionals and litigants) has no right of appeal on all questions of law and fact. The attorney may seek permission to appeal on questions of law alone; or he may obtain an appeal on constitutional questions that the Court of Appeals deems controlling to the case, or on questions of law when an Appellate Division justice has dissented. (A15a, A41a, A89a-90a, G161a-166a.) But his opportunity for review is so severely limited that, usually, the disciplined or disbarred attorney can secure no review at all*



*(A41a). In every other type of proceeeding, however, the State of New York grants the disciplined professional (be he anything from licensed physician to licensed masseur) or the unsuccessful civil litigant or convicted criminal defendant an absolute right to at least one independent judicial review from an initial adverse decision.*

Levin sought permission to appeal his suspension to the State's highest court, the New York Court of Appeals. In addition, Levin expressly claimed that he was entitled to an appeal as of right on his constitutional objections to the State disciplinary procedure (A9a, A44a, F151a-158a). But the Court of Appeals, without opinion, denied Levin's application for leave to appeal, and did not grant Levin any appeal as of right (A9a, A44a).

Levin then petitioned the district court for relief.

## Substantial Questions Are Presented

This appeal calls upon the Court to reaffirm the supremacy of the United States Constitution over State disbarment procedures. It also asks the Court to decide whether New York State has balanced the public and private interests at stake in disbarment proceedings on a scale meeting the tests of the Fourteenth Amendment. The questions thus presented, as Judge Moore has declared, are "of sufficient importance to be resolved by our highest court." In light of the record below, they are now ripe for review and resolution.

The New York Attorney Disciplinary Statute, and the decision below upholding it, proceed from a view that the

public's interest in maintaining an honest bar so outweighs the attorney's interest in preserving his license and reputation that the State is justified in subjecting attorneys to procedures which would otherwise be condemned as unfair and inequitable. This view, we submit, is constitutionally indefensible.

First, it conflicts with long-established doctrine of this Court, as stated succinctly in *In Re Ruffalo*, 390 U.S. 544, 550 (1968):

> "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex parte Garland*, 4 Wall. 333, 380; *Spevack* v. *Klein*, 385 U.S. 511, 515. He is acordingly entitled to procedural due process . . . ,"

and in *Johnson* v. *Avery*, 393 U.S. 483, 490 n.11 (1969):

> "The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights."

Second, vindication of the public's interest in an ethical bar simply does not *require* (let alone justify) disciplining attorneys by arbitrary and draconian means. The public's interest is not advanced by revoking an attorney's license without a fair hearing designed to determine whether the attorney is fit to continue practice. Nor is it advanced by denying to attorneys (unlike everyone else) at least one review of punishment orders before their reputations are irreparably destroyed. Indeed, if the accused attorney is wrongfully accused and is fit to continue in practice, then the State spites its own articulated goals when, as a result of arbitrary procedures, it needlessly expels him from practice.



Third, the State's substantive goals could easily be met here by procedures that *do* comport with due process and equal protection without adding burdens to the State courts. All that would be required is a simple amendment to the Statute designating as statutory trier-of-fact the one who now acts only as a powerless referee. Provision for a referee "to *determine*," as opposed to a referee simply "to *report*," already exists in New York law (A97a).* Or, the New York Supreme Court at nisi prius, as opposed to its Appellate Division, could be made the tribunal of original jurisdiction—as it already is in most other State judicial proceedings. If either of these courses were adopted, as Judge Weinstein noted below:

> "There would be the same effective kind of protection as is now available to all other professionals in the state without adding to the burden of the state system. The trial judge would, under the New York Civil Practice Law and Rules, be required to set forth his reasons for decisions and in accordance with the normal practice the appellate court would hear oral argument and prepare an appellate decision" (A97).

Surely, as Judge Weinstein also declared:

> "If the state can, without undue inconvenience, meet its substantive goals, the excuse for constitutionally suspect procedures becomes impossible to justify" (A96a-97a).

Moreover, even if there *were* some practical difficulty in enforcing the constitutional rights of accused attorneys, that would be no justification for denying them. This

* The decision of a "referee to determine," under New York law, stands "as the decision of a court" and is reviewable on appeal as all other court decisions in the State (A97a).

Court has long refused to permit practical difficulties to overcome constitutional guarantees. *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972), teaches the lesson:

> "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones" (footnote omitted).

*Reed* v. *Reed*, 404 U.S. 71, 76 (1971), also sends the message, in a context similar to this case:

> "Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. . . . [But to] give a mandatory preference to members of either sex over members of the other, *merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment*" (emphasis added).

Finally, of course, there remains the fact that New York's statutory disbarment procedures are simply unfair. They pay lip service to the Constitution, while behaving as if the Fourteenth Amendment did not exist, or as if it applied to everyone but lawyers accused of professional misconduct. The divided court below approves. This Court should not. Instead, we respectfully submit, it should declare the New York statutory procedures for disciplining attorneys unconstitutional, null and void.



## A. Denial of Appellate Review to Attorneys

### *1. Denial of Equal Protection*

This Court has held that, once a State legislature provides for an appellate process, it may not arbitrarily deny an appeal to a selected class of litigants, *Lindsey* v. *Normet*, 405 U.S. 56, 77 (1972):

> "When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."

*Accord, In Re Brown*, 439 F.2d 47, 51 (3d Cir. 1971) (*en banc*). *See also, e.g., National Union of Marine Cooks & Stewards* v. *Arnold*, 348 U.S. 37, 43 (1954).

Accordingly, New York's violation is clear: It affords to all litigants and professionals—*other than attorneys*—at least one judicial review as of right, on all questions, from initial decisions against them, whether rendered by a court or an administrative agency.*

What is more, the State of New York considers such appellate rights to be fundamental procedural protections. Indeed, the State's highest court has held that New York law

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* A complete analysis of the opportunities for judicial review as of right under New York law is set forth as an appendix to the dissenting opinion of Judge Weinstein (A104a-106a).

> "considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved."

*Matter of Luckenbach,* 303 N.Y. 491, 496, 104 N.E.2d 870, 871 (1952). The same view was echoed only recently by one of the appellees herein, Hon. James D. Hopkins, a member of the Appellate Division, Second Department:

> "The notion is firmly rooted that a litigant is entitled to at least one review of an adverse final decision." Hopkins, *The Role of an Intermediate Appellate Court,* 41 Brooklyn L. Rev. 459, 463 (1975).*

Under the Equal Protection Clause, there is *no* legitimate justification for denying procedural rights so "essential" and "firmly rooted" to but one group of persons. *Cf. Stanley* v. *Illinois,* 405 U.S. 645, 658 n.10 (1972), predicating a finding of "constitutional invalidity under the Equal Protection Clause of the Fourteenth Amendment on the observation that a state has accorded bedrock procedural rights to some, but not to all similarly situated."

The majority below agrees that "appeals as of right are quite limited in attorney disciplinary cases," and that "in contrast, decisions which find other New York licensed professionals guilty of professional misconduct are subject to much broader appellate review" (A21a). But the majority upholds this discrimination, and finds no equal protection violation, because (as the State argued) (i) the State may regulate different professions in different ways, (ii) the initial decision against attorneys, unlike other professionals, is rendered by a court, and (iii) denial of appeals to attorneys affords the necessary swift discipline (A21a-24a). The majority and the State are wrong on all three counts.

* For further discussion of the fundamental nature of appellate review under New York law, see Judge Weinstein's dissenting opinion below (at A90a-92a).



In the first place, whether or not the State may regulate different professions in different ways, it is clear that it may not treat different *litigants* in different ways, denying to some the procedural rights that it grants to all others. *Lindsey* v. *Normet, supra. Cf. Griffin* v. *Illinois,* 351 U.S. 12 (1956).

But New York has done just that. It subjects attorneys accused of professional misconduct to the judicial process and then denies to those attorneys the same appellate rights as it gives to all others subject to the judicial process. This is plainly indefensible under the Fourteenth Amendment.

Even limiting our view to "professionals," the State's argument does not withstand analysis. For while the State may well have legitimate reasons for regulating different professions by different substantive standards of conduct, *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608 (1935), and while it may even have legitimate reasons for disciplining different professions by different means, *Pordum* v. *Board of Regents of State of New York,* 491 F.2d 1281 (2d Cir.), *cert. denied,* 419 U.S. 843 (1974)—it has no legitimate reason for denying only to *one* profession appeals as of right from initial punishment orders. This is just the sort of irrational distinction that the Equal Protection Clause was designed to prevent. As Judge Weinstein put it:

> "The state here, however, fails to present distinctions which justify the legislative choice to deny attorneys

an appeal as of right. It is true that the state has a high duty 'to preserve public confidence in the judicial institution and to protect the courts and public from misconduct.' . . . But it owes a similar duty to protect the public from other unfit professionals—doctors, pharmacists, and architects—who can also cause great injury. In *Pordum* the court was concerned with the necessity of an immediate, as opposed to a slightly delayed, hearing. In this case, we are concerned with the procedural safeguard of an appeal from a final decision imposing a grievous sanction. The state gives no reason for denying this important right to attorneys while affording it to all other litigants, including all other professionals" (A94a-95a).

As for the State's second purported justification: If New York did not grant appellate rights to anybody from initial judicial decisions, it might persuasively argue that there was no equal protection violation in its denying such rights to attorneys, since they (unlike other New York professionals) receive initial disciplinary determinations from a court. But the fact is that the State *does* grant appellate rights to *everybody* from initial judicial decisions—except attorneys found guilty of professional misconduct.

Moreover, because of the State's peculiar statutory scheme, New York attorneys have even more practical need of, and constitutional claim to, appellate review than their peers in other professions. This is so because the State has sent attorneys to a judicial body in the first instance without the very protections that presumptively distinguish judicial from administrative proceedings.

Thus, the New York attorney is charged, investigated, tried and sentenced by the same "judicial" body. Further,



he is denied the right to appear before the statutory trier-of-fact, to confront and cross-examine witnesses before the trier, to present oral argument to the trier, or to receive from the trier some explanation for its decision. Under such circumstances, it is unconscionable for the State to argue that it may deny appellate rights to attorneys, while granting them to all other professionals, simply because the attorneys' disciplinary authority is called a "court."* In Judge Weinstein's words:

> "This conclusion is unjustified; the state presents no evidence that initial determinations in non-attorney cases, rendered after a full due process hearing, are more prone to error than initial judicial decisions in attorney cases . . . The special relationship between courts and counsel may justify entrusting attorney discipline to the judiciary, but it does not justify giving attorneys fewer rights than their peers in other professions" (A95a).

Finally, as for the State's third purported justification (the need for swift discipline): It, too, is no justification at all. The short answer was given by Judge Weinstein (A96a):

> ". . . [A]ll professionals and other citizens who deviate from prescribed standards of conduct must be disciplined swiftly and effectively to protect the public from fraud and other harm. Yet the state fails to give any reason why only allegedly deviant attorneys must be denied the right of appellate review."

The ultimate objective of *all* professional disciplinary proceedings is to protect the public against unethical prac-

* Indeed, as we discuss *infra*, because New York attorneys are denied a full and fair hearing in the first instance, the Due Process Clause of the Fourteenth Amendment requires that they be given appeals from initial disciplinary decisions.

titioners. The denial of appellate review to professionals found guilty of misconduct has no relationship whatsoever to that objective, let alone "a fair and substantial" one. *Lindsley* v. *National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). And New York recognizes that for all professionals except lawyers.

Indeed, appellate review is no catalyst of unethical or unlawful conduct. And, again, New York recognizes that for everyone—professionals and non-professionals alike—except lawyers.

The State cannot so cavalierly "bolt the door to equal justice." *Griffin* v. *Illinois, supra,* 351 U.S. at 24 (Frankfurter, J., concurring).

### *2. Denial of Due Process*

The New York attorney's right to appellate review on all questions in an attorney disciplinary proceeding is not derived solely from the Equal Protection Clause. The Due Process Clause guarantees it as well. As Judge Weinstein held:

> "While it is generally true that due process does not require a state to provide litigants with appellate review, the same is *not* true where, as here, the state has failed to provide for a full and fair hearing in the court of original jurisdiction" (A86a-87a; emphasis added).

This Court stated the same in *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District,* 281 U.S. 74, 80 (1930):

> "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, *provided that due process has already been accorded in the tribunal of first instance*" (emphasis added).



*Accord, Lindsey* v. *Normet, supra,* 405 U.S. at 77.

"A fair trial in a fair tribunal is a basic requirement of due process," *In Re Murchison,* 349 U.S. 133, 136 (1955), and if it is not accorded at the trial level, corrective action by way of appeal must be possible. As we show in the following sections, New York does not afford accused attorneys at least one "fair trial" by the court of first instance in a disciplinary proceeding, for that tribunal (the Appellate Division) may (and did in Milton Levin's case) overturn its referee, rule on credibility and impose punishment with no hearing of its own, no oral argument of counsel, and no explanation of its decision. In such circumstances, the Fourteenth Amendment requires the State to give attorneys the process due them through appellate review.

## B. Denial of a Full and Fair Hearing

Our basic argument on this point was stated succinctly by Judge Weinstein below, who held (A83a):

> "In attorney disciplinary proceedings due process requires a hearing by and before the tribunal with the power to decide and punish. The Supreme Court has found such a hearing to be an important 'trial right' without which such fundamental due process guarantees as confrontation and a fair hearing would be devoid of substance. *Barber* v. *Page,* 390 U.S. 719, 721, 88 S.Ct. 1318, 1320, 20 L.Ed.2d 255 (1968); *Berger* v. *California,* 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L. Ed.2d 508 (1969); *Williams* v. *State of Maryland,* 375 F.Supp. 745, 756-57 (D.Md. 1974)."

The New York statutory procedure deprives attorneys of a "hearing by and before the tribunal with the power to decide and punish." The vice of this denial in Levin's disciplinary proceeding was dramatic: The justice serving as referee was the only State officer to see the witnesses and thus to have an opportunity to pass on their demeanor. After a lengthy hearing, he found Levin "candid and credible" in all respects, expressly resolving all credibility questions in Levin's favor (D143a). At that point, we submit, no other tribunal could reasonably or fairly substitute its view for the referee's, after doing no more than reading a cold record. Yet the Appellate Division did just that; and thereby, the only "hearing" Levin had was rendered meaningless. In short, Levin was deprived of the "fundamental requisite of due process"—the "opportunity to be heard" in a meaningful manner. *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). *See Selling* v. *Radford*, 243 U.S. 46, 51 (1917).

The harm was compounded when the Appellate Division refused to grant Levin's request for oral argument by his counsel. The importance of oral argument before the fact-finding court cannot be underestimated. It is an essential part of the trial, which may not be denied to a litigant, particularly to a defendant in a criminal or quasi-criminal proceeding. This Court has recently reemphasized that point in declaring unconstitutional a New York statute permitting the court to deny counsel the opportunity to sum up at the end of a criminal case tried without a jury. *Herring* v. *New York*, —— U.S. ——, 95 S.Ct. 2550 (1975). Thus, as Judge Weinstein held in the circumstances of our case (A67a):



> "The denial of oral argument by the nisi prius court is a denial of the right to counsel under the Sixth Amendment of the United States Constitution. Since the Sixth Amendment is incorporated into the Fourteenth Amendment's right to due process, the New York attorney disciplinary practice constitutes a denial of due process. *See, e.g., Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Kloper* v. *North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967)."

The majority below justifies its contrary ruling on the fair hearing and oral argument issues by characterizing disbarment proceedings as mere "inquests" (A25a). It explicitly rejects this Court's characterization of such proceedings as "adversary proceedings of a quasi-criminal nature" (A17a). *In Re Ruffalo*, 390 U.S. 544, 551 (1968).* But this, we respectfully submit, the majority below has no authority to do.

Moreover, by purporting to do so, the majority has threatened to erode even the few procedural rights that are currently available to attorneys in State disciplinary proceedings. Indeed, if the "inquest" characterization is permitted to stand, it may emasculate the decisions of this Court holding that attorney disciplinary proceedings must meet the essential requirements of procedural due process. *See, e.g., Johnson* v. *Avery*, 393 U.S. 483, 490 n.11 (1969); *In Re Ruffalo, supra*, 390 U.S. at 550 (1968); *Spevack* v.

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* Accordingly, the decision below also rejects the Second Circuit's similar characterization, announced in *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209-10 (2d Cir.), *cert. denied*, 409 U.S. 889 (1972):

> ". . . [I]n our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding."

*Klein*, 385 U.S. 511 (1967); *Selling* v. *Radford*, *supra*, 243 U.S. at 51 (1917).*

Accordingly, the decision below should be reversed. And, this Court should reaffirm that attorney disciplinary proceedings are indeed "adversary proceedings of a quasi-criminal nature," in which the accused attorney is entitled to full procedural due process of law—including a hearing before the statutory trier-of-fact and oral argument to the trier by the attorney's counsel.

### C. Denial of a Written Statement by the Trier-of-Fact of the Reasons for Its Decision

The Statute has yet another fatal defect: It permits the trier-of-fact to discipline or disbar an attorney without saying why. This is so whether the trier (Appellate Division) affirms or disaffirms the referee's report.

This strikes at the very heart of due process. It is fundamentally unfair to the accused attorney himself. And it promotes arbitrariness by the decision-maker, or at least makes detection of arbitrary conduct more difficult in any review of the decision. As Judge Weinstein wrote in upholding Levin's claim (A68a-69a):

> "Minimal due process requires that a decision maker confine itself to the record, to the legal evidence adduced at the hearing, to the applicable rules of law, and to a sound exercise of discretion. Without any written statement from the decision maker, there is no assurance that these requirements are met."

* The definition of an "inquest" is well known. For example, in New York law, "the term inquest has been judicially defined as 'a trial of the issue of fact where the *plaintiff alone* introduces testimony.'" 1973 *Op. Att'y Gen.* 224 (emphasis added). It is difficult to suppose that the Fourteenth Amendment would permit states to revoke professional licenses and ruin professional reputations on the basis of such proceedings. Yet that is just what the majority decision below would permit the states to do.



And in Levin's case, there is strong reason to believe that they were not.

For example, the referee, as we noted earlier, concluded that there was nothing but "conjecture and surmise" to support any of the charges against Levin. He based this conclusion on a penetrating review of all the evidence, which he then embodied in a comprehensive report with detailed findings of fact (D126a-144a). What the Second Department did in the face of all this, however, remains a mystery. How it took the "conjecture and surmise" detailed by the referee and transformed it into evidence requiring a devastating punishment has never been explained. All Levin has from the Second Department is its one-sentence disagreement.

While this Court has yet to hold that due process requires a written statement from the trier in a judicial proceeding, it *has* held due process to impose such a requirement in administrative proceedings. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (right to a written opinion when parole is revoked); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (right to a written opinion when welfare benefits are terminated).

The private interests at stake in an attorney disciplinary proceeding—a lawyer's license, reputation and livelihood—are at least as important as the interests in the *Goldberg* and *Morrissey* type proceedings. Similarly, the

potential for abuse is equally present. And, as Judge Weinstein declared (A72a):

> "Decision by fiat is repugnant to due process whether the decision is rendered by an administrative or judicial tribunal."

*See also* Judge Jerome Frank's opinion in *United States* v. *Forness*, 125 F.2d 928, 942 (2d Cir.), *cert. denied sub nom. City of Salamanca* v. *United States*, 316 U.S. 694 (1942):

> "The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards."

And see *United States* v. *Wood Wire & Metal Lath. Int. U. Loc. No. 46*, 471 F.2d 408, 416 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973):

> "Due process requires that the facts upon which judgment is based be made known to the parties."

Further, a written statement of findings by the trier is as necessary to proper appellate review of judicial decisions as it is to review of administrative decisions. *See United States* v. *Livingston*, 459 F.2d 797, 798 (3d Cir. 1972); *Lemelson* v. *Kellogg Co.*, 440 F.2d 986, 988 (2d Cir. 1971), and cases collected therein.*

Accordingly, we submit, the same considerations that led this Court to require written statements from the trier in administrative proceedings should now lead it to require the same from the trier in judicial proceedings—at least in those non-jury proceedings (such as New York attorney

* If this Court agrees that attorneys should have an appeal as of right on all questions in a disciplinary proceeding, then the need for a written statement is manifest. Appellate review cannot be effective in its absence.



disciplinary proceedings), in which punitive sanctions (such as loss of license or livelihood) may result. As Judge Weinstein put it (A73a):

> "Those punished deserve to know why."

### D. This Court Has Jurisdiction of This Appeal and Should Reverse the Decision Below.

This appeal is taken pursuant to 28 U.S.C. §1253, which provides for direct appeals to this Court from

> ". . . an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Levin's complaint presented a "suit . . . required . . . to be heard" by a three-judge court (since it sought to enjoin the operation and enforcement of a State statute on the grounds that it violated the United States Constitution); and the decision below dismissing Levin's complaint on the merits of his constitutional claim constitutes "an order . . . denying . . . an interlocutory or permanent injunction" within the meaning of §1253.

Thus, there is really no question but that this Court has jurisdiction over Levin's appeal. However, the appellees may seek to raise one based on this Court's decision in *MTM, Inc.* v. *Baxley*, 420 U.S. 799 (1975), and Judge Neaher's opinion below.

In *MTM*, this Court held that

> ". . . [*A direct appeal will lie to this Court under §1253* from the order of a three-judge federal court

> denying interlocutory or permanent injunctive relief *only where such order rests upon resolution of the merits of the constitutional claim presented below*" (420 U.S. at 804; emphasis added).

The appellees may argue that the decision below does not rest upon a "resolution of the merits," because Judge Neaher stated that he would dismiss, not only on the merits, but on the ground of abstention as well. The appellees will be wrong, for the following reasons:

1. Notwithstanding his statements about abstention, Judge Neaher *did* reach and rule on the merits of Levin's constitutional claim (A17a-27a). Indeed, his opinion reaches and resolves the merits *before* it discusses abstention.*

2. Judge Neaher joined with his two colleagues in voting unanimously to continue a stay issued by the *district court* against enforcement of the *State* suspension order against Levin (A33a). Such a stay is totally inconsistent with abstention, as Judge Neaher himself recognized in his opinion (A28a),** and belies any contention that the district court abstained in this case.

3. Judge Moore, the other member of the majority below, voted to dismiss *only* on the merits (A34a). In fact, it is plain that he issued a separate concurring opinion to insure that the majority decision would not be misinterpreted or misconstrued, in light of *MTM*, so as to foreclose a direct appeal to this Court of Levin's substantial constitutional claim.

* Judge Neaher's discussion of the merits begins at A17a; his discussion of abstention begins at A27a.

** Judge Neaher wrote:

> ". . . [I]ssuing a stay of a final judgment of a State court is at least as significant an intrusion into State matters as enjoining prosecution of disciplinary proceedings prior to judgment."



Thus, the *only* majority decision *against* Levin below was a decision on the merits of his constitutional claim. That claim is now ripe for review. The issues have been fully crystallized, briefed and argued. There is a complete record before this Court. The questions presented are of pressing importance. In such circumstances, as Judge Moore wrote (A36a):

> "Procedural obstacles should not prevent the real issue from being decided, if possible."

And the "real issue," as Judge Moore also wrote, is not whether the federal court should abstain in this case. Instead, the "real issue" is a

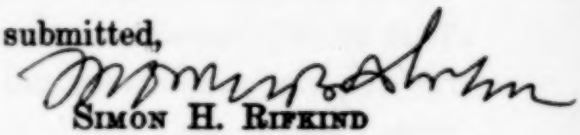
> ". . . *constitutional* question . . . of sufficient importance to be resolved by our highest court . . ." (A43a; emphasis added).

We ask this Court to decide the "real issue" now, and to hold that New York's statutory procedures for disciplining attorneys are incompatible with the Fourteenth Amendment of the United States Constitution.

## Conclusion

**For the foregoing reasons, this Court should accept jurisdiction of this appeal and reverse the decision below.**

Respectfully submitted,



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